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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 773

KWK RADIO, INC., a Missouri corporation, *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JACK P. BLUME
1612 "K" Street, N.W.
Washington, D. C.

ARTHUR M. SOLOMON
31 South Clark Street
Chicago, Illinois 60603

Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above case on June 11, 1964, and its orders of Sept. 19, 1964, denying rehearing.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 337 F. 2d 540. A copy of the opinion of the Court of Appeals for the District of Columbia Circuit and its orders denying rehearing are printed in the Appendix

to this petition. The opinions of the Federal Communications Commission are reported at 34 FCC 1039 and 35 FCC 561 and were reprinted in the Joint Appendix comprising a part of the record below. Copies of this Joint Appendix have been filed in this Court.

JURISDICTION

This petition is timely filed in the Supreme Court of the United States, as it is filed within ninety (90) days of the denial of the Petition for Rehearing in the Court of Appeals for the District of Columbia Circuit, which petition was denied on September 19, 1964. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

(1) Whether the failure of Respondent, Federal Communications Commission, to comply with the prior written notice requirement of Section 9(b) of the Administrative Procedure Act renders its order of license revocation herein unlawful, or whether this omission is excused under the "willfulness" exception to Section 9(b).

(2) Whether a broadcast license can be revoked under Section 312(a)(2) and (3) of the Communications Act by reason of the conduct involved in this case.

STATUTES INVOLVED

The pertinent parts of the Administrative Procedure Act of 1946, 60 Stat. 243, 5 U.S.C. 1001, *et seq.*, are:

> "Section 9. (Section 1008) In the exercise of any power or authority—
>
> (b) LICENSES— . . . Except in cases of willfulness or those in which public health, interest, or

safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements."

The pertinent parts of the Communications Act of 1934, as amended, 66 Stat. 718, 47 U.S.C. 151, *et seq.*, are:

"Section 312.

(a) The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this Chapter or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section; or

(6) for violation of section 1304, 1343, or 1464 of Title 18."

STATEMENT

Petitioner is the licensee of standard broadcast station KWK, St. Louis, Missouri. On May 27, 1963, Respondent Federal Communications Commission ordered Petitioner's license revoked under Section 312 (a)(2) and (3) of the Communications Act of 1934 in that the station conducted two treasure hunt contests, allegedly fraudulent, because the treasures had not been hidden until the latter part of each contest, instead of at the outset. (34 FCC 1039) The Respondent so found notwithstanding the fact that the promised cash prizes were paid to bona fide winners. In so ordering, Respondent, by a 3-to-2 vote, reversed the decision of its Hearing Examiner. On October 31, 1963, Respondent denied a petition for reconsideration of its order of revocation (35 FCC 561).

The conduct complained of was the action of William Jones, the station manager, who went to great lengths to conceal his actions from his employer. Jones held the title of vice-president but, unlike every other officer, had no ownership interest in the station and in reality was an employee. He acted without the knowledge or authorization of any of the directors or other officers of the Petitioner.

Respondent held that Petitioner, acting through this employee, was guilty of willful violations and that because of this willfulness it was unnecessary for Respondent to comply with the "second chance" requirement of Section 9(b) of the Administrative Procedure Act. Further, Respondent held that this willful conduct was sufficient grounds for revocation of the station's license under Section 312(a)(2) and (3) of the Communications Act.

After denial of a Petition for Reconsideration of this order, Petitioner timely appealed to the United States Court of Appeals for the District of Columbia Circuit under the provisions of Section 402(b)(5) of the Communications Act. The Court of Appeals affirmed Respondent's order of revocation in a short *per curiam* opinion which did not reveal the basis for the Court's disposition of the questions of law involved herein. A petition for rehearing *en banc* was denied on September 19, 1964.

REASONS FOR GRANTING THE WRIT

The Need for This Court to Construe Section 9(b) of the Administrative Procedure Act

Section 9(b) of the Administrative Procedure Act provides in pertinent part that "no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements." An exception to the requirement for prior notice and opportunity to cure is provided in cases of "willfulness" or those in which the public health, interest, or safety requires.

In the instant case, Petitioner was not afforded the required notice and opportunity to cure prior to the institution of license revocation proceedings, the Commission contending that the acts in question were willful. The Commission arrived at this conclusion because of its construction of the term "willfulness" as used in Section 9(b) of the Administrative Procedure Act as meaning any act which was intentional. This

interpretation of the term "willfulness" is contrary to the clear intent of the Congress, as expressed in the statute, to afford special protection to licensees who may face the most drastic administrative sanction, revocation of license.

The evidence drawn from the legislative history demonstrates that Congress desired the exception for cases of willfulness to be construed narrowly to allow licensees the full benefits of Section 9(b). Senator McCarran, in reporting to the Senate on the meaning of Section 9(b) stated: "The exceptions to the second sentence, regarding revocations, apply only where the demonstrable facts fully and fairly warrant the application of the exceptions. *Willfulness must be manifest.*" Report of the Senate Judiciary Committee, S. Rep. 752, Administrative Procedure Act—Legislative History, Sen. Doc. No. 248 at 211-212, 79th Cong. 2d Sess. 1946. (Emphasis supplied.) Representative Walter commented that Section 9(b) "prohibits (agencies) from withdrawing a license without first giving the licensee notice and an opportunity to achieve compliance except in cases of *obvious* willfulness or emergency . . ." Proceedings in the House, May 24, 1946, Sen. Doc. No. 248 at 368. (Emphasis supplied).

As against the foregoing congressional interpretation of the term "willful" in the very section now under consideration, the Federal Communications Commission, in a recent decision, showed that it considered the term "willful" to have the same meaning in Section 9(b) as it has in other areas of the law. In *Midwest Radio-Television, Inc.*, 1 Pike & Fischer, R.R. (2d) 491, 495 (1963), the Commission stated:

> ". . . the word 'willfully', as employed in Section 503(b), does not require a showing that the li-

> censee knew he was acting wrongfully; it requires only that the Commission establish that the licensee knew that he was doing the acts in question—in short, that the acts were not accidental (such as brushing against a power knob or switch)." 1 R.R. (2d) at 495.

In arriving at this definition of willfulness, the Commission cited and relied upon cases construing Section 9(b) of the Administrative Procedure Act. Thus, the Commission has made clear that in its view, the term "willfulness" has the same meaning in both statutes and in the numerous other statutes in which the term is used.

But in Section 9(b) of the Administrative Procedure Act, Congress used the term "willfulness" to delineate an exception to the requirement that licensees be informed that their conduct is wrongful. Therefore, only in a case where a licensee already knew that his conduct was wrongful at the time he acted, is there any logical justification for omitting the warning and "second chance". It is submitted that the only logical reading of the word "willfulness" in the exception contained in Section 9(b) is that the term means a knowing violation of a published rule or regulation, or such bad faith conduct as to suggest that the licensee must have known that he was placing his license in jeopardy.

Respondent's view of the term "willfulness" finds some support in the language of decisions of the lower federal courts, such as *Eastern Produce Co., Inc.* v. *Benson*, 278 F. 2d 606 (3d Cir. 1960); *Goodman* v. *Benson*, 286 F. 2d 896 (7th Cir. 1961); and others. However, this view of willfulness, as encompassing everything more than purely accidental conduct, has

been criticized by commentators. See Note, *Procedural Safeguards for Licensees: Section 9(b) of the Administrative Procedure Act*, 75 Harv. L. Rev. 533, 387-389 (1961).

In the overwhelming majority of cases decided by the district courts and circuit courts of appeal construing the section now in question, there were present facts from which the court could properly hold that the licensees had ignored previous warnings and were, therefore, acting with knowledge and evil intent, so that definitions of "willfulness" as "merely intentional" are but *obiter dicta* in such opinions. See, e.g., *Air Transport Associates, Inc.* v. *C.A.B.*, 199 F. 2d 181 (D.C. Cir. 1952), cert. den. 344 U.S. 922 (1953); *New England Air Express, Inc.* v. *C.A.B.*, 194 F. 2d 894 (D.C. Cir. 1952).

This Court has not heretofore considered or construed the prior notice provisions of Section 9(b) of the Administrative Procedure Act, nor the willfulness exception thereto. Many administrative agencies and lower federal courts are being called upon to apply this provision of the statute and are in need of guidelines from the Supreme Court of the United States in cases where there are at stake substantial investments, continued opportunity to pursue a trade or profession under a license, and continued service to the public under the licensed facility. Particularly in a case such as the instant case, where the licensee's conduct is to be judged by a standard no more definitive than the "public interest", this Court should act to insure that the licensee has every benefit provided by the Congress to conform its conduct to the requirements of the regulatory agency before being subjected to the ultimate sanction of license revocation.

A License Cannot Be Revoked Under § 312(a)(2) and (3) of the Communications Act for Conduct of the Kind Here Involved

In Section 312(a) of the Communications Act, Congress has delineated six specific grounds for which the Federal Communications Commission may revoke a license. Other sanctions are available for other violations. Here the Commission's Order of Revocation rests solely upon allegations of violations of subsections (2) and (3) of § 312(a). Specifically, the Commission found that the conduct of the two treasure hunts constituted "conditions coming to the attention of the Commission which would warrant it refusing to grant a license or permit on an original application" and "willful or repeated failure to operate substantially as set forth in the license".

It will be shown that under any reasonable construction of the statute the facts of this case are not within the ambit of subsection (2) or (3) of § 312(a) of the Act. On the contrary, Congress never intended § 312 (a)(2) or (3) to be applicable to the broadcast of contests of the type here involved. Hence, this petition for certiorari presents to this Court the question of whether the Federal Communications Commission has exceeded its statutory authority by so interpreting the language of the Act as to bring almost any conduct of a licensee within its scope.

The language of Section 312(a)(2) of the Act can only be construed to authorize the Commission to revoke a license under that subsection if a "condition" was in existence at the time of its original grant, was not then known to the Commission, and later comes to its attention. To illustrate, if, at the time of the grant an applicant is not a United States citizen, and if the Commission did not know this, it can later revoke the

license when the original lack of legal qualifications comes to its attention.

This interpretation is the only logical one which can be placed on the explicit language of Section 312(a)(2) of the Act relating to conditions *"coming to the attention of the Commission"*. Surely, there is no indication of any intent on the part of Congress to grant the Commission broad authority to revoke a license because a station has determined at some point during its three-year license term to institute some new kind of programming which the Commission might not have approved in an initial license application.

Under any reasonable construction of Section 312(a)(2), it is impossible to avoid the conclusion that that subsection is simply inapplicable to the factual situation here involved. Assuming, *arguendo,* that the contests conducted over Petitioner's station were improper, and assuming further that they did constitute a fraud on its listeners, nevertheless, this was not a "condition" in existence at the time of the grant. Only if these contests had been on the air at the time of the last license renewal, had not been disclosed to the Commission at that time, and came to the latter's attention at a later date, would there be a legal basis for revoking the station's license under the particular subsection cited and relied upon.

It follows then that the license revocation order can be sustained only if it be found to be the appropriate sanction under subsection (3) of Section 312(a) of the Communications Act. But that subsection is equally inapplicable here.

In ordering revocation of this license, the Commission contended that the two treasure hunts constitute a

willful and repeated failure to operate Station KWK substantially as set forth in its license. A basic question, therefore, is what is the proper interpretation of the statutory language "failure to operate substantially as set forth in the license."

Every station's license contains a great many specifications. These include specification of the station's operating frequency, its power, its hours of operation, the height and spacing of its towers, the type of transmitter, monitors and other transmitting equipment to be employed, etc. Clearly, if a station were to operate with equipment other than that specified in its license, or if it were to operate on a frequency, with power, or during hours other than those set forth in its license, there would be a "failure *to operate* substantially as set forth in its license". (Emphasis supplied.) It follows that an order revoking a license which specified one or more deviations from these terms of the license would meet the statutory requirement of Section 312 (a)(3).

But this is not what has been alleged or found in the instant case. Here, the Commission's Decision does not specify any such *operating* provision of the license which had not been observed. Instead, about all that has been alleged in the Commission's Decision which can be related to KWK's license is a purported failure to comply with the broad statutory requirement that KWK, like every other station, "serve the public interest, convenience, or necessity." It is respectfully submitted that this broad allegation is not enough to satisfy the requirements of Section 312(a)(3) and, in fact, that subsection was never intended to apply to any such general, non-specific, statutory language provisions, such as are contained in all station licenses.

As indicated above, Congress, in Section 312(a) of the statute, listed the specific and limited grounds upon which the Commission might revoke a station's license. In the instant case, the Commission has undertaken to stretch the ambit of Section 312(a) so as to make it include many more grounds for license revocation than ever were contemplated by the drafters of that statute. This is so, because by its reliance upon the broad, non-specific, statutory language concerning the obligation to serve "the public interest, convenience or necessity", the Commission appears to be indicating that it may revoke a license for almost anything it may find to be contrary to the public interest.

For example, if the Commission should find that it was not in the public interest for a station to engage in discriminatory hiring practices, combinations in restraint of trade, or a wide variety of other business practices, or, if it finds that the broadcasting or failure to broadcast a particular program or a particular advertising copy is not in the public interest then, according to the theory evolved in this case, grounds would exist under Section 312(a)(3) for revocation of the station's license. Similarly, if a station were to broadcast program material in violation of the sections of the Criminal Code listed specifically under subsection (6) of Section 312(a), under this theory, the Commission could conclude that revocation also lies under subsection (3). This conclusion would be possible since violation of law by a station is contrary to the public interest, and, under the Commission's theory, would support a revocation under subsection 3, even though the violation is specifically provided for in another subsection.

To state the above is to indicate how far the Commission has reached beyond any natural or normal construction of the simple language of Section 312(a) in order to bring the particular programming here involved, within the ambit of the statute. It is respectfully submitted that Congress never intended that subsection (3) be applied to a station's programming and that the only programming matters which will support an order of revocation are those listed in subsection (6). Further, it is submitted that the "public interest" terminology contained in every license cannot be employed as a tent under which almost any action taken by a licensee, at any time, can provide the basis for a license revocation proceeding under subsection (3).

Despite the necessity for a strict construction of the statute in a license revocation case, involving what may amount to "a death sentence" for the licensee, Respondent has here attempted to construe the statute so loosely that it would encompass just about anything. If the Commission's construction of these sections is permitted to stand, the Commission will have succeeded in fashioning a sanction without definable limits and bearing little relationship to the words of the statute. Moreover, the Commission's construction of its authority under Section 312(a) would effectively nullify the rule-making concepts of the Administrative Procedure Act which contemplate published rules for the guidance of those whose conduct is subject to administrative sanctions.

This Court has never construed Section 312(a)(2) and (3) of the Communications Act. The instant case affords an opportunity of providing needed guidelines

to the Federal Communications Commission in its administration of that Act and guidelines for other administrative agencies dealing with similar license suspension and revocation proceedings. Therefore, the questions presented in this Petition for Certiorari are of continuing significance for a vital industry and have significance in broad areas of administrative law and agency practice.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JACK P. BLUME
Fly, Shuebruk, Blume
and Gaguine

ARTHUR M. SOLOMON
Friedlund, Levin & Friedlund

Attorneys for Petitioner.